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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 MARK R. MILLER,

11 Petitioner,

12 v.

13 DAN PACHOLKE,

14 Respondent.

Case No. C08-5138BHS

ORDER DENYING MOTION  
FOR CERTIFICATE OF  
APPEALABILITY

15 This matter comes before the Court on Petitioner's motion for certificate of  
16 appealability (Dkt. 23). The Court has considered pleadings filed in support of and in  
17 opposition to the motion and the remainder of the file and hereby denies the motion for the  
18 reasons stated herein.

19 **I. PROCEDURAL BACKGROUND**

20 Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dkt. 5.  
21 Petitioner's sole ground for relief is ineffective assistance of counsel. *Id.* at 10. Petitioner  
22 contends that he was denied effective assistance of counsel by his trial counsel's failure to  
23 call the victim's sister and mother as witnesses. *Id.* at 10-11, 14-15.

24 On July 17, 2008, the Court adopted the Report and Recommendation of the  
25 Honorable J. Kelley Arnold, United States Magistrate Judge (Dkt. 19), recommending denial  
26 of the petition over Petitioner's objections. Dkt. 21. Specifically, the Court agreed with the  
27 Report and Recommendation's determination that Petitioner raised no factual disputes  
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1 warranting an evidentiary hearing and that Petitioner failed to establish any prejudice  
2 resulting from failure to call the victim's sister and mother as witnesses. *Id.* at 2.

3 The Court also addressed Petitioner's contention that the failure to cross examine  
4 William Kemp constitutes ineffective assistance of counsel, an argument raised for the first  
5 time in Petitioner's reply brief. *Id.* at 2-3. The Court held that this claim was not properly  
6 before the Court and was unexhausted and that Petitioner would be procedurally barred from  
7 raising the claim in state court. *Id.* The Court also addressed the claim on its merits,  
8 concluding that Petitioner failed to offer any evidence that Mr. Kemp had a restraining order  
9 against the victim. The Court therefore found Petitioner's objections to be without merit and  
10 concluded that dismissal of the petition was proper. *Id.* at 3. Petitioner now seeks a  
11 certificate of appealability. Dkt. 23.

## 12 II. DISCUSSION

13 Under 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b), a  
14 petitioner may not appeal the final order in a habeas corpus proceeding in which the  
15 detention complained of arises out of a state court proceeding or in a proceeding under 28  
16 U.S.C. § 2255 unless the district court or the Ninth Circuit issues a certificate of  
17 appealability identifying the particular issues that may be pursued on appeal. *United States*  
18 *v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

19 To obtain a certificate of appealability, a petitioner must make a substantial showing  
20 of the denial of a constitutional right. A petitioner must also demonstrate that reasonable  
21 jurists could debate whether, or agree that, the petition should have been resolved in a  
22 different manner or that the issues presented were adequate to deserve encouragement to  
23 proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the denial is based on  
24 procedural grounds, a petitioner must show that jurists of reason would find it debatable  
25 whether the petition states a valid claim of the denial of a constitutional right and that jurists  
26 of reason would find it debatable whether the district court was correct in its procedural  
27 ruling. *Id.*

1 Having reviewed the record in this case, including the Report and Recommendation  
2 (Dkt. 19), Petitioner's objections thereto (Dkt. 20), and the Court's subsequent order  
3 dismissing the habeas corpus petition (Dkt. 21), the Court finds that the determination that  
4 the state court decision is not contrary to or an unreasonable application of clearly  
5 established federal law is not debatable among reasonable jurists. Therefore, the Court  
6 declines to issue Petitioner a certificate of appealability.

7 **III. ORDER**

8 Therefore, it is hereby

9 **ORDERED** that Petitioner's motion for certificate of appealability (Dkt. 23) is  
10 **DENIED.**

11 DATED this 22<sup>nd</sup> day of August, 2008.

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15 BENJAMIN H. SETTLE  
16 United States District Judge  
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